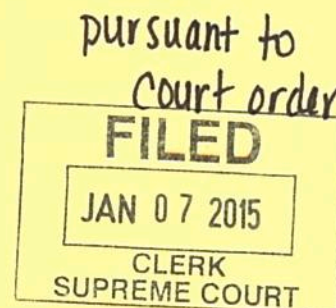


COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2015-SC-000271-DE



REBEKAH MCCARTY

APPELLANT

v.

APPEAL FROM BATH CIRCUIT COURT
HON. BETH LEWIS MAZE
CASE NO. 12-CI-00123

COURT OF APPEALS CASE NO. 2014-CA-000113

KENNETH FARIED

APPELLEE

**REPLY BRIEF OF APPELLANT
REBEKAH MCCARTY**

Respectfully submitted,

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Counsel for Appellant

CERTIFICATE PURSUANT TO CIVIL RULE 76.12(6)

The undersigned certifies that a true and accurate copy of the REPLY BRIEF OF APPELLANT was served upon each of the following via U.S. mail, postage prepaid, this 23rd day of December, 2015: i) M. Janice Lintner, Lynch, Cox, Gillman & Goodman, 500 West Jefferson Street, Suite 2100, Louisville, KY 40202; ii) Honorable Beth Lewis Maze, Judge, Bath Circuit Court, P. O. Box 1267, Mt. Sterling, KY 40353; iii) Samuel P. Givens, Jr., Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601. The undersigned further certifies that the record on appeal was not withdrawn after the Court of Appeals' opinion was issued.


Counsel for Appellant

STATEMENT OF POINTS AND AUTHORITIES

Omitted pursuant to CR 76.12(4)(f).

STATEMENT OF PURPOSE

This Reply Brief on behalf of Appellant is submitted pursuant to CR 76.12 to address issues raised by Appellee in his Brief submitted to the Court on December 2, 2016.

ARGUMENT

I. APPELLEE'S ARGUMENTS ARE PREMISED ON MISCHARACTERIZATION OF THE ARGUMENTS OF COUNSEL AND THE ACTIONS OF THE TRIAL COURT.

One of the easiest ways to attack an opponent's position is to mischaracterize it and then critique the result. In his brief the Appellee has adopted this tactic, asserting that the Appellant seeks to abandon the recognized standard of the child's reasonable needs when a guideline deviation is appropriate [*Downing v. Downing*, 45 S.W.3d 449, 454 (Ky. Ct. App. 2001)] and instead to focus on the "obligor parent's ability to pay" as the criteria for establishing support when the parties have neither married nor resided together. (Appellee's Brief, pp. 2, 10) Neither the trial court nor the Appellant seek to alter the reasonable needs standard. Both recognize, however, that the method for implementing the standard developed for dissimilar circumstances is unworkable under these circumstances.

In fact the Appellee seeks to alter the established standard by inserting an unwarranted modifier to the standard, characterizing it as an “**established** reasonable needs standard....” (Appellee’s Brief, p. 2)(Emphasis added). That modification is not one imposed by Kentucky’s appellate courts and is particularly inappropriate in the circumstances of this case when the parent in possession of the greater financial resources has not assisted in establishment of the lifestyle by which the needs would be determined. Because Kentucky recognizes the legal and moral duty of BOTH parents to contribute to the support of their child, it follows that BOTH parents should have contributed to establishment of the reasonable needs. Here one parent has not contributed and now seeks to profit from that failure.

In the same vein Appellee claims that the trial court ignored “the lifestyle actually chosen by the parents.” (Id.) The suggestion that Appellant chose the reduced circumstances that her lack of finances allowed her for the child is indefensible. Her request for support for the child is ample evidence that she sought more reasonable living conditions for the parties’ daughter. For Appellee’s part, his role in choosing the lifestyle of the child and her mother was the lack of appropriate support which then mandated the reduced circumstances. Contrary to Appellee’s contention, the trial court recognized that the parents had not jointly chosen or established a lifestyle and so sought carefully and deliberately to determine what the child’s reasonable needs would be considering what the child’s lifestyle might have been had the parents lived as a couple with her. *Schoenbachler v. Minyard*, 110 S.W.3d 776, 784 (Ky. 2003).

By attempting to alter the standard by which the Court’s determination of a proper guideline deviation was analyzed, by suggesting that Appellant chose and was satisfied

with impoverished circumstances and wished to abandon the “reasonable needs” criteria, Appellee seeks to distract from the true issue: what is the rational standard for assessment of a child’s reasonable needs when one parent has income in excess of the guidelines and the parents have not established a joint lifestyle through marriage or cohabitation.

II. APPELLEE HAS ATTEMPTED TO ALTER THE EVIDENTIARY STANDARD TO SUIT HIS POSITION

Appellee claims that there was literally “no evidentiary support” for the anticipated expenses which were requested by Appellant. (Id. at 4) Appellee’s contention has no validity unless this Court were to determine that the only acceptable evidence would consist of actual expenditures and that anticipated expenses are disallowed as they have not been incurred, *i.e.*, that proof consists only of actual payment. The result would be an evidentiary absurdity, disallowing evidence of future medical expenses, lost wages, anticipated reasonable monthly expenses for purposes of maintenance, or a myriad of other issues in which some degree of uncertainty exists.

Appellant offered testimony from her experience and inquiry in her local area as to housing, food, utilities, clothing and other expenses. The testimony is in essence lay opinion under KRE 701. The Rule requires that such opinions or inferences be:

(a) Rationally based on the perception of the witness,

(b) Helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue, and

(c) Not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Appellant’s testimony was properly found by the trial court to be admissible and sufficient to provide the court with a rational basis for its analysis of the proposed

anticipated reasonable expenses for the minor child. Appellee's objection to the foundation on which the trial court based its analysis is actually that the court should be required to equate "reasonable" with "actual" such that no child would be entitled to receive support above the standard of living established by the parent with the least resources if, as here, the wealthy parent had avoided meaningful contribution.

III. AN ANALYSIS OF APPELLEE'S COMPLAINTS REVEALS THAT THEY FOCUS ON CONTROL OF THE OTHER PARENT AND NOT ON FINANCES

The complaints raised by the appellee are unrelated to finances and instead are actually an effort to exercise control over the child's primary custodial parent. Appellee's main concern appears to be the fact that the child's mother, an individual the Appellee did not marry, has entered into a relationship and has a second child. Although not raised nor preserved for appeal, Appellee seeks a mathematical reduction of the expenses based upon the number of members of the child's household. Such has never been a standard adopted by this jurisdiction and an examination leads to the conclusion that it is not focused on the child's needs but instead is to serve as a form of punishment for the mother's failure to forgo an opportunity for a new relationship and family.

It is telling that Appellee also objects to the mother's inclusion of the cost of clothing for the child in her expense request because at the time of trial Appellee claimed to be voluntarily sending clothing for the child. Ignoring the lack of any binding obligation on the Appellee to send clothing, the practice is not sanctioned or included in the statutory scheme for support. If the true concern were the monthly cost of the child's clothes, the cost is the same whether Appellee purchases and mails clothes or clothing is covered as a part of the monthly support obligation. The mother should not be put in the

position of seeking a modification of support if and when the obligor determines to end a nonmandatory practice which contributes to the child's support.

CONCLUSION

Appellant urges the Court to reject the suggestion that when the parties have not jointly established a lifestyle with their child, the circumstances in which the child is found at the time support is requested are presumed to represent the child's "reasonable needs" for purposes of a warranted deviation from the guidelines. Appellant requests a determination that the trial court's well-reasoned rationale for its deviation from the child support guidelines be found not to be an abuse of the court's discretion but to be reasonable, fair and supported by sound legal principles, representing a sound basis for assessment of child support when the child's parents have not married or cohabitated.

Respectfully Submitted,



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